No. 11527

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC STATES CORPORATION, a corporation,

Appellant,

vs.

FRANK D. HALL, *et al.,*

Appellees.

APPELLANT'S REPLY BRIEF.

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POINT I.

The Amendment of February 9, 1939, to the Declaration of Trust Is Valid and Enforceable.

For the first time in the seven years of litigation that have marked the attempt of appellant to collect the debt here in issue, counsel for appellees have attempted in their brief to prove that the amendment of February 9, 1939, to the declaration of trust was not a valid contract. (App. Br. pp. 40-42.)

This is exactly contrary to the position taken by appellees during the State court action which preceded the instant proceedings. (See 53 Cal. App. (2d) 625.) In fact, appellees even admit in their brief that in the Superior court action they pleaded and claimed "that the effect of the modification agreements had been to extend

the maturity of the note, . . . and "that the court should fix a reasonable time for the making of sales by appellees under the modified release agreement of February 9, 1939." (A. B.,* p. 7.)

Appellees further admit in their brief that "on February 9, 1939, the declaration of trust was again amended to further reduce the release price." (A. B., p. 6.)

In our opening brief, on pages 6 and 7, we have quoted portions of the complaint filed by appellees in said Superior Court action, wherein appellees allege that from July 30, 1932, until June 1, 1940, moneys were received by the trustee from the proceeds of the sale of the real property in question and were applied in the reduction of the principal and the payment of interest on the note of July 30, 1927. We have also quoted the verified complaint of appellees to the effect that these moneys were so applied in this manner throughout said period, and that at all times during said period the appellees continued to operate under the deed of trust dated July 30, 1927, and Trust No. 5873. [Tr. p. 121.]

In our opening brief we have also called the attention of the Court to the express admission in the appellees' complaint in said Superior Court action that it was the plan and intention of appellees under the amendment of February 9, 1939, that appellees should continue to sell the real property described in the deed of trust and that payments should be made from the proceeds of such sales on the note of July 30, 1927, in the reduction of principal and the payment of interest, and that except for the

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*The abbreviation "A. B." will be used throughout this brief to indicate *Appellees' Brief*.

changes in the release prices, the parties should continue to act and perform their respective duties under the original declaration of trust in the same manner as prior to July 30, 1932. [Tr. p. 123.]

Not only have the appellees admitted the validity of the amendment of February 9, 1939, in the Superior Court action and in the within action, including their admissions in their brief herein, but even the quoted testimony of the appellee Frank D. Hall, set forth in appellees' brief on pages 20 and 21, indicates that the appellees have at all times regarded the amendment of February 9, 1939, as valid and binding upon them. In reliance upon this agreement, Mr. Hall testified, and appellees emphasized in their brief, on pages 20 and 21, that he was trying to sell the subdivided lots in question from February 9, 1939 to February, 1941, and that he spent all of his available time in this endeavor.

Appellees now seek to reverse their position completely to challenge the validity of the 1939 amendment. They present the specious argument that the absence of the corporate seal of Farm Home Builders may affect the validity of the document, although the law is well settled that it is not necessary to affix a seal to validate the 1939 amendment.

See:

First National Finance Co. v. Five-O Drilling Co., 209 Cal. 569;

Pacific National Bank v. Corona National Bank, 113 Cal. App. 366.

Furthermore, under Section 1629 of the Civil Code and Section 1932 of the Code of Civil Procedure, all distinctions between sealed and unsealed instruments are now abolished.

The weakness of the position of the appellees is betrayed by their reliance upon the lack of signature of the secretary of Farm Home Builders on the 1939 amendment as a further ground of attack upon its validity. (See A. B., p. 40.)

There is no requirement under the law that this contract be signed by the secretary.

Civ. Code, Section 345;

McCormick v. Stockton, etc. R. R. Co., 130 Cal. 100.

This is particularly true where both Frank D. Hall and Marguerite S. Hall signed the amendment directly below the spaces provided for the corporate signatures.

Greve v. Taft Realty Co., 101 Cal. App. 343;

Arnold v. La Belle Oil Co., 47 Cal. App. 290;

Rauer v. Fernando Nelson & Sons, 53 Cal. App. 695;

Schuyler v. Pantages, 54 Cal. App. 83.

The sufficiency of the signatures of Frank D. Hall and Marguerite S. Hall to bind the corporation is emphasized by reason of the evidence and finding that Farm Home Builders was the *alter ego* of Frank D. Hall and Marguerite S. Hall.

The Conciliation Commissioner-Referee has found that Farm Home Builders Incorporated was created and organized by them, and that Frank D. Hall was at all

times its president and general manager, and Marguerite S. Hall its vice-president. It has also been found that said corporation was wholly owned and controlled by Frank D. Hall and Marguerite S. Hall; the promissory note of July 30, 1927 was individually guaranteed by Frank D. Hall and Marguerite S. Hall, and they received no consideration whatsoever from said corporation for the conveyance of the title to the real property in question to said corporation. [Tr. p. 25.]

The Honorable William C. Mathes, in his memorandum of decision in this case, approved the findings and conclusions of the Conciliation Commissioner-Referee in the following language:

> "In 1927 title to the ranch property was in the debtors, Frank D. and Marguerite S. Hall, husband and wife. During that year debtors organized the Farm Home Builders Corporation which they wholly owned and controlled, and thereupon transferred the ranch property to that corporation. The Commissioner has found that the corporation is the *alter ego* of the debtors." [Tr. p. 58.]

Furthermore, appellees admit in their brief that Farm Home Builders was organized by the appellees in 1927, and that they have wholly owned and controlled it at all times and transferred title to the real property in question to said corporation without consideration. (A. B., p. 4.)

Appellees also admit in their brief that the District Court of Appeal in its opinion reported at 53 Cal. App. (2d) 625:

> ". . . ruled that Farm Home Builders hold title to the property as a constructive trustee for the appellees." (A. B., p. 7.)

Thus, there can be no doubt of the *alter ego* relationship between appellees and Farm Home Builders. It is respectfully submitted that the signatures of Frank D. and Marguerite S. Hall on the amendment of February 9, 1939, are certainly a sufficient and valid execution of that document, and that both the appellees and Farm Home Builders are bound thereby.

Nowhere have appellees stated that Farm Home Builders was not authorized to enter into the amendment of February 9, 1939, or that Frank D. Hall was not authorized to sign such agreement on behalf of and as president of said corporation, as he did.

The readiness of appellees to deny the validity of the 1939 amendment is indicative of the extremes to which they will go in an attempt to evade the payment of the obligation here involved.

The weakness of the position adopted by appellees is further indicated by their argument on page 41 of their brief that, because Farm Home Builders' corporate powers were suspended for nonpayment of franchise tax at the time of the execution of the amendment of 1939, *appellees* can now repudiate that agreement. Fortunately, the law does not permit the wrongdoer to evade his responsibility by hiding behind his own wrong.

While it is true that the amendment was voidable under Political Code 3669(c) and General Laws, Act 8488, Sec. 32, the only party to the agreement who could have the same declared void was Pan American Bank, acting through the Superintendent of Banks, to whom appellant is successor in interest. Certainly Farm Home Builders never had any right to repudiate the contract for their

own failure to pay the corporate franchise tax, and it is unthinkable that Frank D. Hall and Marguerite S. Hall, who owned and controlled the corporation as their *alter ego,* and who executed and delivered this agreement, and acted in reliance thereon, could repudiate the same.

The very case cited by the appellees in support of their position contains the rule which defeats their contention. In *Depner v. Joseph Zukin Blouses,* 13 Cal. App. (2d) 124, 127, quoted at page 41 of appellees' brief, the Court defines a voidable contract as *"one which is void as to the wrongdoer, but not void as to the wronged party unless he elect to so treat it."*

See, also:

> *Myrick v. O'Neill,* 33 Cal. App. (2d) 644;
>
> *Storrs v. Belmont, etc. Co.,* 24 Cal. App. (2d) 551.

Even if there were no *alter ego* relation between Farm Home Builders and the appellees, therefore, no right to repudiate the 1939 amendment would lie in appellees. And this conclusion is fortified by reason of said *alter ego* relationship and by reason of the admitted conduct of the parties in the performance of the obligation provided by the 1939 amendment.

We respectfully submit that there was no defect in the execution of the 1939 amendment which in any way affects its validity. But even if one of the minutiae relied upon by appellees on pages 40 and 41 of their brief had any weight whatsoever, it would be a sufficient answer to such a specious claim to say that under the circumstances of the case at bar both Farm Home Builders and appellees are estopped from denying the validity

of the 1939 amendment at this time. Not only did the signatures of the appellees amount to an express ratification of the act of their *alter ego* (*Johnson v. California, etc. Assn.,* 24 Cal. App. (2d) 322), but in view of the sales efforts and payments made by appellees pursuant to the contract for a period of two years from its execution, appellees are estopped from denying its validity. (See: *Boteler v. Conway,* 13 Cal. App. (2d) 79; *Cook v. Central, etc. Co.,* 104 Cal. App. 554; *Berry v. Maywood, etc. Co.,* 13 Cal. (2d) 185; *Pacific Factors, Inc. v. St. Paul Hotel, Inc.,* 113 Cal. App. 657.) And under the circumstances of the case at bar, it is respectfully submitted that the corporation itself is estopped from denying Frank D. Hall's authority to sign the contract on behalf of the corporation as its president.

> *Wood Estate Co. v. Chanslor,* 209 Cal. 241;
> *Kaplan v. Reid Bros. Inc.,* 104 Cal. App. 268.

In addition, when appellees sued in the prior State court action, relying upon the 1939 amendment, that in itself was an implied ratification of said agreement so as to estop the appellees from now repudiating their verified complaint in an effort to avoid said agreement. (See *Mannon v. Pesula,* 59 Cal. App. (2d) 597.)

The conclusion drawn by appellees in the closing paragraph of Point IV(c) on page 42 of their brief, relating to the invalidity of the 1939 amendment is, we submit, as unsupported as the grounds upon which they rely

for invalidity. The appellant has, at all times since it acquired the interest on which its instant claim is founded, insisted upon the performance of the provisions of the amendment of February 9, 1939. That amendment provides that other than the changed release prices, "in all other respects the said declaration of trust shall be and remain in full force and effect and binding upon the respective parties hereto." The declaration of trust admittedly provides for a trustee's sale of the property in the event of default in payments.

The provisions of the declaration of trust setting forth the obligation of the appellees are set forth on pages 12 and 13 of our opening brief.

The District Court of Appeal, in its aforesaid opinion, has expressly found that "on November 13, 1939, taxes, principal and interest were in default." (53 Cal. App. (2d) 625, 638.)

Thus, appellant has, at all times since acquiring its interest herein, proceeded pursuant to and in reliance upon the provisions of the aforesaid declaration of trust No. 5873, as amended in 1935 and in 1939, and appellant respectfully prays that the seven years' litigation which have balked its attempt to be paid the full sum owing may be ended by a judgment of this court ordering appellees, as a condition to the removal of the lien and encumbrance of appellant, to pay to appellant the obligation due on the note of July 30, 1927, including principal and interest until paid.

POINT II.

There Is No Evidence of Waiver of Interest.

Declaration of Trust No. 5873 expressly provides that no waiver shall be construed from the acceptance of any overdue sum or from the failure to declare default and proceed with a sale under the declaration of trust.

The trust instrument states as follows:

> "The acceptance of any sum or sums secured hereby, principal or interest, after the same becomes due and payable, or the performance of any or all obligations herein mentioned, shall not operate as a waiver of a right to insist upon the payment when due of all other sums secured hereby and the performance of any or all obligations herein mentioned, and to declare default and to proceed with the sale under this declaration of trust." [Tr. pp. 289-290.]

The amendment to the trust of February 9, 1939, expressly provides that, except for the change in the schedule of release prices, the original declaration of trust was to continue in full force and effect. [Tr. p. 184.] There is not one iota of evidence showing a direct intention of the parties to waive the interest required by the original Trust No. 5873 whose express purpose is:

> "to secure the payment of the indebtedness of the trustor to Pan American Bank of California in the sum of $45,000.00 and interest thereon, together with any renewal and/or renewals and/or extensions thereof." [Tr. p. 277.]

The written contract of the parties can be altered only by an express written agreement or an executed oral agreement. (Civ. Code, sec. 1698.) We respectfully submit that the evidence herein fails to show proof of any such alteration.

The most obvious rebuttal to the argument of appellees in Point I of their brief is that the parties expressly reaffirmed the provisions of the original declaration of trust by the amendments executed in 1935 and in 1939. Had there been any intention on the part of any of the parties to alter the obligation to pay interest or to waive accrued interest or subsequent interest, provision would have doubtless been made in the written agreement of the parties for the same. The failure to make such provision, and the express ratification and reaffirmation of the original declaration of trust with the new release prices, is irrefutable evidence that the parties did not intend to alter the obligation to pay interest.

The appellees place great reliance upon the periodic statements of the Citizens Bank, admittedly received by the parties without complaint. And yet, appellees themselves admit, on page 43 of their brief, that:

> "The Citizens Bank was not the creditor and was not capable of itself contracting with Farm Builders, or any other person, in reference to the note. It had no power to extend or renew the note or to alter its terms in any way, . . ."

With this statement we heartily concur, and we respectfully submit that it correctly states the law applicable herein, to-wit, that the Citizens Bank was at no time authorized or empowered by any of the parties hereto, or by any of their predecessors in interest, to alter or modify the terms of the written agreements among the parties. An examination of the transcript will confirm this position by revealing that there is no evidence of an oral or written authorization by any of the parties to said bank to alter or modify the agreements of the parties.

Appellees also seek to rely upon an asserted waiver of interest by the Superintendent of Banks. Here again their own brief reveals the weakness of such a position, for it is admitted on page 22 of the appellees' brief that the only indication of a waiver by the Banking Commissioner was an asserted offer in 1939 by Mr. McFaul to Mr. Hall to settle the entire indebtedness for a lump-sum payment of $15,000.00.

Three things are immediately apparent:

(1) Appellees did not pay said sum of $15,000.00, or any other sum, in full payment of their obligation at that time or at any time thereafter.

(2) Mr. McFaul was merely endeavoring to wind up the affairs of Pan American Bank and to recommend to the Banking Commissioner a settlement of the claim against appellees for a lump sum payment. He himself had no proved power or authority to release appellees from any obligation whatsoever.

(3) It is interesting to note, in addition, that there is an element of inherent improbability in the testimony of Mr. Hall, quoted on page 22 of appellees' brief, for it there appears that the Deputy Banking Commissioner was willing to accept $15,000.00—but was *not willing to accept $18,000.00*—in full payment of the obligation of appellees. Why the Deputy Banking Commissioner should be willing to recommend a settlement for $3,000.00 less than the appellees were willing to offer, is difficult, if not impossible, to explain.

If there was any intention on the part of Citizens Bank to so word their ledger sheets and periodic statements of account as to provide a waiver of interest, surely on a

matter involving such considerable sums of money as were here involved some written notation of an express waiver of interest would have been made at some time during the many years of the existence of the trust. Yet there is *no* evidence that the Citizens Bank *at any time* recorded anywhere on its books or advised in writing any of the parties hereto or their predecessors in interest that any interest was to be waived.

On the contrary, appellees themselves cited the testimony of Mr. C. M. MacFarlane, Assistant Trust Officer of Citizens Bank, who had supervision of all accounting in the Trust Department since 1928, and under whose general supervision all of the statements of account were prepared, *that he did not know why interest was not included.* (A. B., pp. 23 and 24.)

Thus, there is no evidence that the Citizens Bank ever intended that its periodic statements of account should be used as a device by the appellees for evading their liability to pay interest on the obligation herein involved. (See *Nelson v. Chicago Mill & Lumber Corp.*, 76 F. (2d) 17.)

An interesting analogy on the subject of *waiver* is the case of *Thompson v. Gorner,* 104 Cal. 168. Plaintiff sued to foreclose a mortgage given to secure a promissory note. The note provided for the payment of monthly interest at the rate of 8 per cent per annum and that "if said principal or interest is not paid as it becomes due, it shall thereafter bear interest at the rate of 1 per cent per month." Delinquent payments were accepted with monthly interest at the rate of 8 per cent per annum for

several months. The question on appeal was whether or not plaintiff, by accepting a lesser rate of interest than that provided, had waived the right to demand 1 per cent a month in the future.

The Court in that case quoted Section 1698, Civil Code, which provides that:

> "A contract in writing may be altered by a contract in writing or by an executed oral agreement, and not otherwise."

The Court then said:

> ". . . Under the principle of this section the plaintiff was entitled to recover interest at one per cent per month for the time during which she refused to accept, and did not accept, interest at eight per cent per annum. She did not contract in writing to change the interest as expressed by the written terms of the note; and her acceptance of the eight per cent was of no higher dignity than an express oral agreement. But it was an *executed* agreement only as to months for which she accepted the interest at eight per cent; as to the future it was executory (*Erenberg v. Peters,* 66 Cal. 114; *Taylor v. Soldati,* 68 Cal. 27; *Simmons v. Hamilton,* 56 Cal. 493), and void under said section of the code. (*Johnson v. Polhemus,* 99 Cal. 240.)"

Not only was there no accord and satisfaction between appellees and the Banking Commissioner, but, even if appellees had paid the principal sum due on their obligation, that in itself would not have been a bar to the subsequent recovery of interest, since the promissory note and declaration of trust expressly provide for the payment of interest.

See:

New York Trust Co. v. Detroit, T. & I. R. Co. 1918; (C. C. A. 6th), 251 Fed. 514;

Nelson v. Chicago Mill & Lumber Corp., ante;

Alabama City, G. & A. R. Co. v. Gadsden (1913), 185 Ala. 263, 64 So. 91, Ann. Cas. 1916C, 573;

Bassick Gold Mine Co. v. Beardsley (1910), 49 Colo. 275, 112 Pac. 770, 33 L. R. A. (N. S.) 852;

Canfield v. Eleventh School Dist. (1849), 19 Conn. 529;

Kimball v. Williams (1910), 36 App. D. C. 43, Ann. Cas. 1912B, 1331;

Rice-Stix Dry Goods Co. v. Friedlander Bros. (1923), 30 Ga. App. 312, 117 S. E. 762 (affirmed in (1924), 158 Ga. 303, 122 S. E. 890);

Grennon v. New Orleans Pub. Serv. (1931), 17 La. App. 700, 136 So. 309;

American Bible Soc. v. Wells (1878), 68 Me. 570, 28 Am. Rep. 82;

Davis v. Harrington (1894), 160 Mass. 278, 35 N. E. 771;

Stone v. Bennett (1843), 8 Mo. 41;

Fake v. Eddy (1935), 15 Wend. 76;

Crane v. Craig (1921), 230 N. Y. 452, 130 N. E. 609 (affirming as modified order in (1920) 193 App. Div. 791, 184 N. Y. S. 740);

Smith v. Buffalo (1896), 39 N. Y. S. 881;

Balfour & K. Co. v. Ranow (1926), 127 Misc. 21, 215 N. Y. S. 181;

King v. Phillips (1886), 95 N. C. 245, 59 Am. Rep. 238;

Standard Grocery Co. v. C. D. Taylor & Co. (1917), 175 N. C. 37, 94 S. E. 520;

Graveson v. Odd Fellows' Temple Co. (1897), 4 Ohio N. P. 112, 6 Ohio D. N. P. 287;

Bennett v. Federal Coal & Coke Co. (1912), 70 W. Va. 456, 74 S. E. 418, 40 L. R. A. (N. S.) 588, Ann. Cas. 1913E, 578.

Appellees in their brief place considerable reliance on the fact that part payments were received by appellant and its predecessors in interest in a lesser amount than that currently due. In our opening brief we have explained that the reason for the acceptance of these payments was the general financial depression that began in 1929 and impeded the sales of the property here involved and induced forbearance in collection of the obligation due. But such forbearance, particularly in the light of the amendments of 1935 and 1939 to the trust do not amount to a waiver of interest. The general rule is stated in 47 Corpus Juris Secundum 40, that:

> "The acceptance of the principal and a part of the interest due is not a waiver of the entire amount of interest due where interest is expressly reserved by the contract and forms a part of the debt . . .
>
> "Where the right to interest is based on a contract, which provides therefor, the acceptance of payment of the principal debt does not waive the right to interest, and, . . . does not preclude a subsequent recovery of such interest; . . ."

It is extremely interesting to note that in their Petition for Determination of Amount of Existing Lien and Encumbrance, appellees utterly fail to allege or claim that there had been any waiver of interest. [Tr. pp. 8-12.]

It is also interesting to note that in said petition appellees admitted that they had paid not less than $13,669.68 as interest on the note of July 30, 1927. [Tr. p. 9.]

Strictly speaking, the defense of waiver of interest is therefore not even properly before this court. Even if it were, however, under the facts of this case we respectfully submit that there is no evidence of any waiver of interest and that the appellees should be required to pay their full obligation, including principal and interest, as a condition to the removal of the lien of appellant.

POINT III.

Under the Terms of the Note in Question, 7% Interest, Compounded Quarterly, Is Payable Both Before and After Maturity and Until Payment Is Actually Made.

In Point II of appellees' brief it is sought to be proved that, where a promissory note provides for interest "until paid," such a provision does not include a promise to pay interest after maturity.

Appellees also seek to prove that, where a note provides that "should interest not be so paid, it shall become part of the principal and thereafter bear like interest"—such provision applies before maturity only.

Let us first examine the cases cited by appellees to prove that where a note provides for interest "until paid" it does not mean interest "until paid" but means only interest "until maturity."

Puppo v. Larosa, 194 Cal. 717; *U. S. National Bank v. Waddingham,* 7 Cal. App. 172, and other cases relied on in Point II of appellees' brief are distinguishable from

the case at bar. The *Puppo* case and the *Waddingham* case are illustrations of written obligations which expressly provided that they bore *no interest* after maturity. Yet in each of these cases, and in many others, including those where no mention was made of interest after maturity, and which did not provide for interest "until paid," *California courts have nevertheless allowed such interest.* (*Kohler v. Smith,* 2 Cal. 597; *Malone v. Roy,* 107 Cal. 518; *Nesbitt v. MacDonald,* 203 Cal. 219; *U. S. v. Foreman,* 102 Cal. App. 756; *Kennedy v. Dutton,* 116 Cal. App. 510; *Pitzer v. Wedel,* 73 A. C. A. 86.)

All of the foregoing cases, including the *Puppo* case and the *Waddingham* case, illustrate the proposition that under the law of California, where one person lends money to another, with a promise to repay on a date certain, and such money is not then repaid, the law invokes an implied promise to pay interest from date of maturity, *even where no interest has been provided for by the agreement of the parties.* Appellees now seek to take this salutary rule of providing reasonable compensation for the use of money to a lender, and to distort it so as to avoid paying interest on the obligation here involved from 1936 to the present date. Far from supporting the position of appellees, the rule of law which allows interest after maturity even where *none* was provided, is entirely consistent with the *allowance* of interest after maturity, where the instrument provides for interest "until paid."

In the *Waddingham* case the note provided for *no interest* until paid—and also provided for a definite rate of interest after maturity if not paid at maturity. It is clear that the only way of reconciling these two provisions contained in the promissory note was to interpret it,

as the Court did, to require no interest until maturity, and the agreed rate after maturity. Such an interpretation, however, completely fails to support the proposition advanced by the appellees. And it is respectfully submitted that, where a note provides for interest at an agreed rate until paid, and makes no specific reference to any change of rate after maturity, the words "until paid" should be interpreted to mean until actually paid, whether such payment be made before or after maturity.

In addition to the cases cited in our opening brief on this point, the attention of the Court is respectfully called to the following authorities: *Shepherd v. Pepper* (1889), 133 U. S. 626, 33 L. Ed. 706, 10 Sup. Ct. Rep. 438; *New Orleans v. Warner* (1899), 175 U. S. 120, 44 L. Ed. 96, 20 Sup. Ct. Rep. 44; *Fauntleroy v. Hannibal* (1879), 5 Dil. 219, Fed. Cas. No. 4,692, affirmed in (1881) 105 U. S. 408, 26 L. Ed. 1103; *Northwestern Mut. L. Ins. Co. v. Perrill* (1879), 4 Ohio L. J. 196, Fed. Cas. No. 10,339; *Sanford v. Savings & L. Soc.* (1895), 80 Fed. 54; *Lockwood v. Lindsey* (1895), 6 App. D. C. 396; *Bank of Illinois v. Stickney* (1842), 5 Ill. 4; *Dudley v. Reynolds* (1863), 1 Kan. 285; *Small v. Douthitt* (1863), 1 Kan. 335; *Crosthwait v. Misener* (1877), 13 Bush. 543; *White v. Curd* (1887), 86 Ky. 191, 5 S. W. 553; *McNeil v. Watkins* (1894), 15 Ky. L. Rep. 780; *Duran v. Ayer* (1877), 67 Me. 145; *Augusta Nat. Bank v. Hewins* (1897), 90 Me. 255, 38 Atl. 156; *Taylor v. Wing* (1881), 84 N. Y. 471; *O'Brien v. Young* (1884), 95 N. Y. 428, 47 Am. Rep. 64; *Wilcox v. Van Voorhis* (1891), 58 Hun. 575, 12 N. Y. S. 617; *City Real Estate Co. v. MacFarland* (1910), 67 Misc. 286, 122 N. Y. S. 477; *Zimmermann v. Klauber* (1910), 139 App. Div. 26,

123 N. Y. S. 642; *Sands v. Gilleran* (1913), 159 App. Div. 37, 144 N. Y. S. 337; *Morrisania Sav. Bank v. Bauer* (1881), 3 Month. L. Bull. 102; *Lanahan v. Ward* (1876), 10 R. I. 299; *Mobley v. Davega* (1881), 16 S. C. 73, 42 Am. Rep. 632; *Miller v. Hall* (1882), 18 S. C. 141; *Miller v. Edwards* (1882), 18 S. C. 600; *Bowen v. Barksdale* (1890), 33 S. C. 142, 11 S. E. 640; *Jensen v. Lichtenstein* (1915), 45 Utah 320, 145 Pac. 1036; *Smith v. Deane,* 125 Wash. 368; *Davis v. Anderson,* 224 Ala. 400, 140 So. 423; *Benjamin Moore & Co. v. O'Grady,* 9 Cal. App. (2d) 695, 50 P. (2d) 847; *Pacific Finance Co. v. Lillie,* 27 A. (2d) 794 (Conn. 1942); *Merchants Finance Co. v. Goldweber,* 35 N. E. (2d) 780 (Ohio 1941); *Mutual Sav. & Bldg. Assn. v. Canon Block Inv. Co.,* 67 Colo. 75, 185 Pac. 649.

In *Agency of Canadian Car & Foundry Co. v. American Can Co.,* 258 Fed. 363, the obligation to pay interest "to the date of payment of the amount" was held to require interest after maturity and until full payment.

In *Shepherd v. Pepper, supra,* the Court, referring to notes which bore interest "at the rate of 9 per cent per annum until paid," says: "In regard to allowing interest on the principal of the notes at the rate of 9 per cent per annum until paid, it is to be said that such was the contract in each note."

In *Lockwood v. Lindsey, supra,* it is held that a judgment on a note bearing interest "at the rate of 8 per cent per annum from the date hereof until paid," made and payable in a foreign jurisdiction where such rate was legal, was properly rendered for the amount of the principal sum for which the note was given, with interest

thereon at the rate of 8 per cent per annum from the date of the note until paid.

The case of *Bank of Illinois v. Stickney, ante,* involved notes drawing interest at a specified rate from date until paid; a mortgage on a stock of goods, etc., authorizing a sale before the maturity of the notes, if deemed necessary by the mortgagee, was given as security for the notes; by subsequent agreement the goods were sold before maturity of the notes, and notes payable at a date after the maturity of the original notes were taken in payment therefor. It was held that the mortgagee was entitled to his interest on the original notes until the maturity of the sale notes.

It is held in *Dudley v. Reynolds* and *Small v. Douthitt, ante,* that a promissory note bearing interest at a specified rate "until paid" binds the maker to pay the specified rate for the use of the sum named in the note until the debt is paid, and not merely until maturity of the note.

In *Crosthwait v. Misener,* 13 Bush (Ky.), 543, it is held that a note with interest "at the rate of 10 per cent per annum from date until paid" bears interest at that rate until actual payment. This case even went to the extent of requiring sale bonds given on a coercive sale of the maker's property in payment of the claim, and running for six months to bear the same rate of interest as the note itself.

White v. Curd, 86 Ky. 181, 5 S. W. 553, involved a note made payable with interest from date at a specified rate, but it was shown that it should have been with interest at that rate from date "until paid." The Court held that the note, as it read, would have borne interest

at the specified rate only until maturity, and thereafter at the legal rate, but that, with the mistake corrected, it would bear interest at the specified rate until payment.

In *McNeil v. Watkins,* 15 Ky. L. Rep. 780, an action upon a note which, by its terms, bore 10 per cent interest from date, it was claimed by the plaintiff that the agreement was that the note should bear this rate of interest until the debt should be paid, and that the words "until paid" were omitted by mistake of the draftsman; this agreement was established as to one of the makers, but not as to others. The Court held that a judgment against the former for 10 per cent was proper, but that as to the other makers, the judgment should not be for a greater rate of interest than 6 per cent after the maturity of the note.

Two notes were involved in the case of *Duran v. Ayer,* 67 Me. 145; one stipulated merely that it was with interest at a specified rate, the other that it was with interest at said rate "till such note is paid." The Court said:

> "The notes were on time, and at the rate of 12 per cent. It has been held in such case that after maturity of the note, the plaintiff is entitled to interest by operation of law, and not by any provision of the contract."

This language would seem to make no distinction between the two notes, but liability to pay interest on the second note at the rate specified therein to the time of trial, which was long after maturity, seems to have been conceded.

In the late Maine case of *Augusta Nat. Bank v. Hewins,* 90 Me. 255, 38 Atl. 156, it is held that a promissory note payable at a certain time after date with interest at the rate of 9 per cent until paid bears interest at that rate

after the maturity of the note as well as before. The Court calls particular attention to the use of the words "until paid," and says:

> "It had already been decided that without these words such a note would draw the stipulated interest till maturity, and only the legal rate of interest (6 per cent) thereafter. *Eaton v. Boissonnault* (1877), 67 Me. 540, 24 Am. Rep. 52. We think it was to guard against this result that the words 'until paid' were inserted in the note now under consideration."

It is held in *Mobley v. Davega,* 16 S. C. 73 ,42 Am. Rep. 632, that a note payable twelve months after date, "with interest from date at 12½ per cent per annum, interest payable annually," and described in a mortgage executed contemporaneously to secure its payment, as a note "with interest thereon at the rate of 12½ per cent per annum till paid," draws the same rate of interest after maturity as before. The Court bases its conclusion partially on the fact that the note itself, though running only one year, provides that interest shall be payable annually, thus indicating "a mutual stipulation for an indefinite extension," of credit, and annual payment of interest during the extension, but the decision is also rested upon the words "till paid," used in the description of the note in the mortgage.

The note sued on in *Bowen v. Barksdale,* 33 S. C. 142, 11 S. E. 640, was made payable "twelve months after date with interest from date (at) 10 per cent per annum . . . and if not paid at maturity the interest to be added to the principal and bear interest, and so continue until the note is paid." It was held that interest at the rate specified should be added to the principal after maturity of the note annually.

In *City Real Estate Co. v. MacFarland,* 67 Misc. 286, 122 N. Y. Supp. 477, the Court says:

> "The mortgage in suit provides for the payment of the debt on December 13, 1906, with interest thereon to be computed at and after the rate of 5½ per cent per annum until the whole of said principal sum is paid. Under such a provision the contract rate of interest governs until payment of the principal, or until the contract is merged in the judgment."

Morrisania Sav. Bank v. Bauer, 3 Month. L. Bull. (N. Y.) 102, involved a bond and mortgage providing for the payment of interest at the rate of 7 per cent per annum until the principal sum should be paid. It was held that this rate of interest would apply until the principal sum was paid, or until judgment was rendered, in spite of a change in statute reducing the legal rate of interest, but not affecting contracts already existing.

A few New York cases which might appear to be opposed to the general rule in that state really support it, but are distinguished on the ground that the words relied on in each case were not equivalent to the expression "until paid."

In *Ferris v. Hard,* 135 N. Y. 354, 32 N. E. 129, it is held that a provision in a bond for the payment of a specified sum in four equal annual payments, that it should be "with interest semi-annually on all sums remaining from time to time unpaid," is not like an agreement to pay interest on a principal sum until that principal sum is paid, and hence that the bond would bear interest at the specified rate only until maturity, and thereafter only at the legal rate.

Weyand v. Park Terrace Co., 135 App. Div. 821, 120 N. Y. Supp. 192, was an action to foreclose a mortgage bearing less than the legal rate of interest, and containing a provision that the whole of the principal sum should become due upon default of the payment of interest. The mortgagee elected to declare the principal due, and, in discussing the rate of interest which should be allowed thereafter, the Court says:

> "If the obligation had been to pay interest until the principal sum was paid, then the rate determined in the obligation must have obtained until the contract was merged in the judgment."

This case was subsequently reversed in (1911) 202 N. Y. 231, 36 L. R. A. (N. S.) 308, 95 N. E. 723, Ann. Cas. 1912D, 1010, on the ground that there had been no default, but without any allusion to the question of interest.

The interest provision in the mortgage considered in *Savage v. Beecher,* 139 N. Y. Supp. 173, read:

> "With interest thereon at the rate of 4½ per cent per annum, such interest as may have then accrued to be paid on the first day of June, 1895, and thereafter interest to be paid semi-annually on each first day of June and December, until the principal sum hereby secured shall be paid and on the day when said principal sum shall be paid."

It was held that this clause simply provided that until the principal sum should be paid, the obligor should pay interest semi-annually on the date specified, and was not intended to fix the rate of interest after maturity.

Miller v. Hall, 18 S. C. 141, involved a bond conditioned for payment in five equal annual instalments "with inter-

est payable annually from date upon the whole amount unpaid and at the rate of 10 per centum per annum." It was held that the bond bore annual interest at the specified rate after maturity of the last instalment as well as before, the Court construing the words "upon the whole amount unpaid" as equivalent to the words "till paid." The case of *Miller v. Edwards,* 18 S. C. 600, involved the same points as *Miller v. Hall* (S. C.), *supra,* and was heard with it, and a similar decision rendered. In each of these cases there was a dissenting opinion, but it goes only to the question as to whether the words used in the bond were equivalent to the words "till paid," and does not dispute the conclusion of the prevailing opinion that if the latter expression had been used, the effect would have been to continue the specified rate of interest after maturity.

In *Fauntleroy v. Hannibal,* 5 Dill. 219, Fed. Cas. No. 4,692, affirmed without discussion of this point in 105 U. S. 408, 26 L. Ed. 1103, it is held that municipal bonds bearing interest at the rate of 10 per cent per annum, payable upon presentation of coupons, "until the payment is well and truly made of the said principal sum," would bear interest at the rate of 10 per cent after maturity, although the coupons themselves, which contained no provision as to interest, would bear interest only at the rate of 6 per cent after the date upon which they were payable.

In *New Orleans v. Warner,* 175 U. S. 120, 44 L. Ed. 96, 20 Sup. Ct. Rep. 44, it is held that warrants issued by a city under a statute providing that they should be paid from a certain fund, and that if on presentation there were not sufficient moneys in such fund to meet them, they should thereafter bear interest at a prescribed

rate above the legal rate of interest "until paid," such provisions being also expressed in the warrants themselves, would bear interest at the prescribed rate from the time of their presentation until actually paid.

The exact wording of the provision for interest considered in *Sanford v. Savings & L. Soc.,* 80 Fed. 54, cannot be determined from the report of the case, but the court held that the agreement of the parties was that the original debt should bear interest at the specified rate until paid, and hence that the rate was not affected by the date of maturity.

The general rule is summarized in 47 C. J. S. 49, as follows:

> "Thus, as the contract provides for a certain rate of interest until the principal sum is paid, such contract generally will control the recovery as to the rate after maturity; in other words, the contract governs until the payment of the principal or until the contract is merged in a judgment."

In 47 C. J. S. 50, it is further stated as follows:

> "Where a debt is payable in instalments, with interest at an agreed rate on such instalments, such rate has been held to govern after the instalment becomes due and payable, as well as before its maturity; . . ."

The most recent case found on the subject is *In re Realty Assoc. Securities Corp.,* 66 Fed. Supp. 416, in which the Court says, at page 419:

> "It has been held that a contract which provides a rate of interest 'until the principal shall be paid' must be construed as evidencing the intention of the parties that the contract rate should govern to and

including the time when the principal debt is actually satisfied, however long after maturity that may be."

The Court cites the following authorities:

O'Brien v. Young, 95 N. Y. 428;

Zimmermann v. Klauber, 139 App. Div. 26, 123 N. Y. Supp. 642;

In re Oklahoma Ry. Co., 61 Fed. Supp, 96 (Dist. Ct. Okla. 1945);

Taylor v. Wing, 84 N. Y. 471;

City Real Estate v. MacFarland, 67 Misc. 286, 122 N. Y. Supp. 477;

Canadian Car & Foundry Co. v. American Can Co., 258 Fed. 370.

In Point II of their brief, appellees also attack the allowance of compound interest at any time—and particularly after maturity. The weakness of appellees' argument is indicated by the quotation from *Robertson v. Dodson,* 54 Cal. App. (2d) 661, 665, relied upon by appellees, that where the intention of the parties to allow compound interest is clearly expressed in writing and signed by the party to be charged, such interest will be awarded by the courts.

This rule is also set forth in *Schneider v. Turner,* 10 Cal. (2d) 771.

How much more clearly could the intention of the parties on this subject be set forth than was done in the case at bar, where the note expressly provides: "Should interest not be so paid, it shall thereafter become part of the principal and thereafter bear like interest"?

It is extremely interesting to note that appellees, in the last paragraph on page 33 of their brief, admit that the *rate* of interest both before and after maturity remains at 7 per cent, and that at least as to the *rate,* the advent of maturity makes no difference.

If, therefore, the obligation to pay interest "until paid" requires payment after maturity and until actual payment, and if the provisions concerning the compounding of interest are clear, the appellant and appellees are at least agreed as to one thing; that is, that the applicable rate after maturity will be the same as that provided before maturity. It is equally clear from the instrument itself that the rate applicable before maturity is interest "at the rate of seven (7%) per cent per annum, payable quarterly, in advance."

Appellant and appellees are in accord on one additional point, and that is that the following language in the case of *Puppo v. Larosa, ante,* at page 720, is the law of the State of California:

> "When money is not paid according to the terms of a note, the holder suffers a detriment properly compensable in damages, which courts have generally adjudged to be the rate of interest agreed upon in the note, if it be within the legal rate (Sec. 3289, C. C.) *between maturity and the date of judgment.*" (A. B., p. 31.)

We therefore respectfully submit that in the light of the authorities quoted above, since the instant obligation provides for interest *until paid,* interest is provided until date of *actual* payment herein, and that such interest continues at the same after maturity as it was before maturity, to-wit, 7 per cent per annum, compounded quarterly.

In the case at bar, as noted above, there was no express intention on the part of the trustee-bank or any of the parties hereto, or their predecessors in interest, to waive any interest. The only consent that may be deemed to have been given to the periodic accounts submitted by the trustee-bank is that the meager amounts of money which were available could be applied to the reduction of principal rather than to the payment of interest.

In *Star Stationery Co. v. Rogers,* 88 F. (2d) 482 (C. C. A. (3d) 1937), it was held that a payee on a written obligation does *not* waive interest on the unpaid balance of principal after maturity by failing specifically to apply the payments received to interest. The Court deemed it proper for the parties to apply the part payments as they saw fit, without disturbing their contractual obligation.

Similarly, in *Nelson v. Chicago Mill & Lumber Corp.,* 76 F. (2d) 17, it was held that where a contract for lumber required 6 per cent per annum interest on deferred payments, plaintiff's acceptance of principal did not preclude the recovery of interest in accordance with the contract.

Thus, we respectfully submit that, since loans are presumed to be made on interest unless otherwise stated in writing (*Wells Fargo Co. v. Enright,* 127 Cal. 669; *Semi-Tropic, etc. Assn. v. Johnson,* 163 Cal. 639), and since the parties have expressly agreed here for 7 per cent interest per annum, compounded quarterly, until the entire obligation be paid, and since the application of partial payments to reduction of principal does not alter the obligation of the parties, appellees should, under the law and in equity and good conscience, be required to pay said obligation in full.

POINT IV.

Interest Should Be Allowed From the Inception of the Proceedings Under Section 75 to Date.

In addition to the authorities cited in their opening brief, we respectfully call the attention of the Court to certain additional cases which have followed the general rule that, where the estate of a bankrupt turns out to be sufficient to pay all claims in full and leave a surplus over, interest will be allowed on all claims during the administration of the estate. (*Nolte v. Hudson Nav. Co.* (1925, C. C. A. 2d) 8 F. (2d) 859; *Central Nat. Bank v. Bateman & Cos.* (1925), ... Del. Ch. ......, 131 Atl. 202 (rule recognized).

And in *In re People, ex rel. Emmet* (1925), 125 Misc. 806, 212 N. Y. Supp. 258, the Court, citing *People v. American Loan & T. Co.* (1902), 172 N. Y. 379, 65 N. E. 200, said that as against stockholders of a corporation, interest is chargeable down to the time of the payment of claims in insolvency, before there can be a return of any surplus to them.

The case of *Ohio Sav. Bank & T. Co. v. Willys Corp.*, 8 F. (2d) 463, concedes that interest will be allowed on claims against an estate in the hands of a receiver if the assets prove to be more than sufficient to pay the principal of all allowed claims.

Even if appellant were to concede that the testimony of Frank D. Hall, quoted on pages 15 and 16 of the appendix to appellees' brief, were not a change from his testimony set forth on pages 14 and 15 of said appendix—*there is, nevertheless, a surplus in the bankrupt estate*

herein sufficient to allow the payment of interest as claimed and prayed for by appellant.

Appellant concedes that $49,878.38 in cash is being held by the trustee-bank, subject to the order of the Court herein. [Tr. p. 30.] Viewing Frank D. Hall's testimony in the meaning claimed by his attorneys in their brief, the value of the remaining real property is approximately $35,000.00. (A. B. p. 58.) Thus, according to appellees' own figures, the total net value of the appellees' estate is the sum of $84,878.38.

The claim of appellant as of September 1, 1947, is for the sum of $77,591.51.

Thus, there are clearly sufficient assets in the estate to pay the claim of appellant in full. And it is particularly appropriate that such claim be paid in this case, because appellant is the sole creditor of the appellees.

Appellees claim, on page 56 of their brief, that the fact that certain moneys are held by the Court, is sufficient to stop the running of interest on the obligation herein involved. We respectfully submit that this view is erroneous. Section 1494, Civil Code provides that:

> "An offer of performance must be free from any conditions which the creditor is not bound, on his part, to perform."

And it has been held that the imposition of unwarranted conditions amounts to a refusal of performance rather than a tender of performance, which would stop the running of interest. (*Woody v. Bennett*, 88 Cal. 241; *Roffinella,* 191 Cal. 753; *Laiblin v. San Joaquin Ag. Corp.*, 60 Cal. App. 516.)

It is respectfully submitted that, since the only condition upon which the money on deposit with the trustee bank subject to court order, would be available to the appellant would be upon the removal of appellant's lien from the property of appellees, and since appellant respectfully contends that its lien and claim is greater in amount than that heretofore determined by the Court, the availability of money within the control of the Court to pay appellant was combined with an unreasonable condition and therefore does not amount to a tender of performance sufficient to stop the running of interest. For appellant to have accepted the money held subject to the order of the Court, would have involved a forfeiture by the appellant of its claimed right to more than $40,000.00 in excess of the amount ordered to be paid to appellant by the District Court.

The rule is stated in 47 C. J. S. 65, that:

> "Interest will not be suspended if the condition is unreasonable or one which the debtor has no right to impose." (*Taylor v. Hemphill,* 238 S. W. 986 (Tex.).)

Similarly, it has been held that the mere taking of an appeal does not in itself stop the running of interest. (*In re Borden's Will,* 50 N. Y. Supp. (2d) 715, 182 Misc. 501.)

In 47 C. J. S. 69, the following appears:

> ". . . it has generally been held that a mere modification of the judgment below does not suspend the running of interest pending the appeal. . . . where the amount for which the judgment was rendered is increased on appeal. (*The Kia Ora,* 252 Fed. 507, 164 C. C. A. 423.)"

Conclusion.

In Point VII of appellees' brief, the attempt is made to deny the effect of the judgment in *Hall v. Citizens National Bank,* 53 Cal. App. (2d) 625, by asserting that a new trial will be required.

It is respectfully submitted that there is no issue left to be tried in that case. Appellees sought permanent and temporary injunctive relief against the sale of the property included within the declaration of trust and the deed of trust which are the subject of this suit. No further appeal lies at this time from the said decision of the District Court of Appeal. Since no injunctive relief of any kind can be granted to appellees against the enforcement of the obligations which are the subject of the instant litigation, it appears that there is no issue left to try upon a new trial and that the aforesaid decision of the District Court of Appeal has become and is now a final judgment. And it is respectfully submitted that said judgment is final under the well recognized rule in California, not only as to all matters which were asserted by appellees as grounds for injunctive relief therein, but also as to any additional grounds which might have been asserted by appellees and which they now seek to assert in the instant case.

It is therefore respectfully prayed that this Court reverse the order of the Honorable District Court herein and remand this case with instructions that the money now under control of the District Court be forthwith

distributed to appellant as a *pro tanto* payment of the obligation of appellees, and that the remaining real property in question be sold forthwith and the net proceeds applied in payment of the full obligation of appellees on the principal sum of $45,000.00, with interest thereon from July 30, 1927, to date of payment, at the rate of 7 per cent per annum, compounded quarterly, and with credit for all payments made to date.

Respectfully submitted,

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By Marvin Wellins,
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